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STEPHEN R. KOONCE  
President

September 11, 2009

**VIA ELECTRONIC FILING**

Chief Clerk  
Office of Chief Clerk  
ATTN: Agenda Docket Clerk, Mail Code 105, TCEQ  
P.O. Box 13087  
Austin, Texas 78711-3087

**Re: Docket No. 2009-0848-AIR**

Dear Chief Clerk:

Enclosed for filing, please find applicant, APAC-Texas, Inc.'s, Responses to Hearing Requests in the above referenced matter. Please contact me at the above telephone number if there are any issues or questions. Thank you for your assistance in this matter.

Cordially,

A handwritten signature in black ink, appearing to read "Stephen R. Koonce", written in a cursive style.

Stephen R. Koonce  
President

Encl.

cc: See attached Mailing List

APPLICATION BY	§	BEFORE THE
APAC-TEXAS, INC.	§	TEXAS COMMISSION ON
FRISCO, COLLIN COUNTY, TEXAS	§	ENVIRONMENTAL QUALITY

**APPLICANT APAC-TEXAS, INC.'S RESPONSES**  
**TO HEARING REQUESTS**

APAC-Texas, Inc. ("APAC"), Applicant for Air Quality Permit No. 8597 for the continued operation of a hot mix asphalt facility located at 14900 SH 121 in Frisco, Collin County, Texas, files this its response to requests for hearing and would show the Texas Commission on Environmental Quality ("TCEQ) the following:

**I. Introduction and Background**

The hot mix asphalt facility has been in operation at its current location since 1981. It has been operated in accordance with its permit originally issued by the Texas Natural Resource Conservation Commission, predecessor to the TCEQ. The current application for renewal was received by TCEQ November 12, 2007 and was deemed to be administratively complete on November 28, 2007. APAC published its Notice of Receipt and Intent to Obtain an Air Quality Permit in the Dallas Morning News on November 28, 2007.

APAC held an open house at the facility for the general public in April of 2008 to allow neighbors to see the facility and ask questions of APAC personnel. An informational meeting also held in Frisco on May 6, 2008. Following this meeting, TCEQ requested the performance of air quality modeling; APAC performed the requested modeling and submitted the report to TCEQ Air Permits Division on September 30, 2008. TCEQ personnel audited the report and found the impacts to be acceptable for all review types and pollutants.

The facility is located between two unaffiliated ready mix concrete plants all of which are readily visible from SH 121 and have always been so. The facility currently uses a wet scrubber to control particulate matter emissions; however, APAC also applied for a permit for a fabric filter baghouse to replace the wet scrubber. The replacement will allow for reduction in water usage at the facility and bring the facility in line with current best available technology (BACT) standards for the control of particulate matter emissions for hot mix asphalt facilities. The baghouse would be installed in accordance with permit timelines following issuance of the renewal permit. The request for hearing submittals and process surrounding such have had the unintended effect of delaying the implementation of BACT since it is not reasonable either to require or to install the baghouse until such time as the status of the permit renewal is determined.

The facility is currently permitted to operate on recycled fuel oil, diesel fuel and natural gas. In 1999, the permit was modified to allow the use of recycled fuel oil meeting the standards contained in 40 CFR 279 regarding the management of used oil and other limitations provided in the permit. This provision allows for the reduced consumption of non-renewable fossil fuels while still protecting the environment and is a common means of recycling in the hot mix asphalt

industry. Natural gas is permitted but is not currently in use due to the removal of the gas connection and meter in relation to road widening by the City several years ago. APAC also utilizes recycled asphalt pavement in its mixes in order to avoid additional fossil fuel consumption and to save landfill space.

## II. Hearing Requests

In accordance with 30 TAC 55.201(i)(3)(C), there is not a right to contested case hearing in this matter since the application is for the renewal of an air permit that would not result in an increase in allowable emissions or the emission of an air contaminant not previously released. This provision notwithstanding, submittals for a contested case hearing or public hearing were submitted by four persons/entities. These are: the City of Frisco; Carolyn Kresek-Lis; State Representative Ken Paxton; and a group of persons representing the Collin County Commissioners Court consisting of Keith Self, Phyllis Cole, Jerry Hoagland, Joe Jaynes and Jack Hatchell (collectively referred to as the “County Commissioners”).

The request from the City of Frisco dated December 5, 2007 states that the facility is located within the City’s corporate limits and asserts that the City is adversely affected by: a purported “documented” degradation of the air quality in the vicinity of the facility that has had a negative impact on nearby residents; by allegedly not maintaining a sufficient buffer zone; by allegedly failing to “properly monitor ... burner feedstock quality”; and by allegedly failing to use best available control technology to protect health and safety of nearby City residents by preventing the release of harmful particulates and odors. The letter, however, goes on to state that either “withdrawal of the application or implementation of best available control technology at the Applicant’s facility will resolve the City’s concerns.”

The request from Carolyn Kresek-Lis dated November 30, 2007 states that her child attends a school approximately 2,000 feet from the facility and that she is concerned about her child’s health in association with particulate matter emissions. The request goes on to cite concerns regarding the use of “reclaimed industrial oil” as a fuel source, the use of a venturi scrubber rather than a fabric filter, and the lack of fencing or barriers for particulate matter control. The request from Ken Paxton dated December 14, 2007 states that he has “constituents who have concerns with this application” for renewal and essentially that all citizen concerns should be resolved before final action is taken on the permit. The request from the County Commissioners adopted December 18, 2007 states that they are duly elected representatives of the people of the County and desire a public hearing to “ensure that all public health and safety issues” are to be fully examined and resolved before final action on the permit.

### A. Affected Persons

Per 30 Tex. Admin. Code §55.209(e), responses to hearing requests are to address whether the requestor is an “affected person”. The definition of an affected person is found in 30 Tex. Admin. Code 55.203(a) which provides: an affected person is one who has a justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.

An interest common to members of the general public does not qualify as a personal justiciable interest.” The code goes on to state in subpart (b) that “[g]overnmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.” Here, three of the requestors appear to be members of the government or local governments. Additional guidance as to the meaning of the term “local government” is found in the Texas Health and Safety Code at section 382.003(8) which defines “local government” as “a health district established under Chapter 121, a county, or a municipality.”

Here, there is no dispute that the City of Frisco is a municipality and that the County Commissioners represent the County; however, that is not the end of the determination. The factors provided at 30 Tex. Admin. Code 55.203(c) are, at a minimum, required to be considered. The first three factors are: 1) whether the interest claimed is one protected by the law under which the application will be considered; 2) distance restrictions or other limitations imposed by law on the affected interest; and 3) whether a reasonable relationship exists between the interest claimed and the activity regulated. These factors all revolve around the interest claimed by the requestor. As summarized above, both the City and Carolyn Kresek-Lis provide some explanation of their requests; however, that is not the case with regard to the request from State Representative Ken Paxton or the County Commissioners. While we appreciate Representative Paxton’s input and his representation of his constituents and are happy to speak with him, without a specific interest being provided, the application of the factors cannot be performed and the request does not comply with legal requirements for such requests. As provided at 30 Tex Admin Code 55.201(d)(2), a hearing request must “identify the person’s personal justiciable interest affected by the application, including a brief but specific, written statement explaining in plain language the requestor’s location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public.” State Representative Ken Paxton neither qualifies as a local government nor has he specified in his request the required justiciable interest required or how he will be adversely affected. Accordingly, APAC does not believe that State Representative Ken Paxton is an “affected person” under the law because of the definition of local government and/or the lack of a specifically identified interest.

With regard to the County Commissioners, although they do appear to qualify as a local government per the above definition, their request, like Ken Paxton’s, fails to identify an interest or how they may be adversely affected, a mandatory requirement of a hearing request. Factor number 6 of section 30 Tex. Admin. Code 55.203(c) states that, for governmental entities, their statutory authority over or interest in the issues relevant to the application is to be considered. Texas Local Government Code section 81.033 provides that the commissioner’s court may not exercise powers of a municipality under specified chapters. Assuming the nature of any interest is related to health and safety, this is a power of the state and the municipality. Accordingly, without specifying an interest and demonstrating that it is within the statutory authority of the County Commissioners, they are not an “affected person” under the law.

The City’s request letter states how it alleges it has been adversely affected by the operation of the facility in the past. This does not, however, identify any new impact or interest.

Additionally, the City's jurisdiction is limited to nuisance conditions and air ordinances which are not inconsistent with TCEQ rules and orders. (See Tex. Health & Safety Code 382.113). The issues raised are the province of TCEQ and regulated by TCEQ such that the City is not, under these facts, an affected person. Also, regardless of whether the City is an affected person notwithstanding, the City's letter specifically states that if APAC implemented BACT, that its concerns would be resolved. As addressed, APAC has already submitted an application to implement BACT by installing a fabric filter baghouse<sup>1</sup>. This installation has been delayed by the pending determination of the permit renewal. Upon issuance of the renewal permit, implementation of BACT will become a permit condition for the facility. Accordingly, the City's request for hearing should be treated as withdrawn or moot based upon its stated terms making the determination of whether it is an "affected person" irrelevant.

The request from Carolyn Kresek-Lis on behalf of her minor son, a student at an elementary school, states that her primary concern is potential health risks from particulate matter although additional specific concerns are mentioned as addressed below. Her request, however, does not identify that her son has an actual health problem or that any change is anticipated from the granting of the renewal permit. Additionally, the purpose of permitting is balancing of the protection of health and environment and the need for industry such as the facility at issue to support community needs. This balancing is recognized and satisfied by measures such as output limitations, watering requirements, and the air quality modeling audited by TCEQ. These measures as well as the operating history of the facility over the past 28 years demonstrate that there is no likely health impact associated with the renewal of the permit. Accordingly, Ms. Kresek-Lis is not affected person.

#### B. Disputed Issues

As specified in 30 Tex. Admin. Code 55.209(e), the applicant is to address "which issues raised in the hearing request are disputed." As stated above with regard to the request from State Rep Ken Paxton and the County Commissioners, no issues are actually identified. Mr. Paxton's letter makes reference only to unspecified constituent concerns and the County Commissioners request is for ensuring all public health and safety issues are examined and resolved. With regard to either letter, it must be assumed that the Executive Director's Response to Public Comments addresses any such issues. Accordingly, there are no known disputed issues with regard to either the request from Ken Paxton or the County Commissioners.

Should TCEQ choose to treat the City's request for hearing as not being moot or withdrawn, APAC disputes any and all issues raised in the hearing request. With regard to the alleged "documented degradation" of the air quality, this is assumed to refer to a study performed by Dan Witliff Consulting at the request of the City of Frisco. As addressed in the Executive Director's Response to Public Comment<sup>2</sup>, this study was not overseen or requested by TCEQ and could not be verified by TCEQ. Nonetheless, the City erroneously promotes the study's findings as proof of problems associated with the APAC facility. To the contrary, the study states that an

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<sup>1</sup> The Executive Director's Response to Public Comment response to comment 5 acknowledges that the baghouse is BACT.

<sup>2</sup> See Response to Comment number 4.

independent toxicologist's review of the chemicals of concern<sup>3</sup> are not likely to "cause adverse health effects particularly at the average concentrations likely present on a day-to-day basis." The only exception was sodium particulate which was assumed in the study to be sodium hydroxide. The study further states that the "in the area of this ambient air quality assessment, the most likely source of sodium is sodium hydroxide which is commonly associated with concrete batch plants." APAC's facility is a hot mix asphalt plant. It is bordered on the east and west by concrete batch plants. This lack of an issue is further supported by a TCEQ study conducted in 2004 which found the facilities (APAC's and the concrete batch plants) to be "in full compliance with their air emissions authorization."<sup>4</sup> Accordingly, neither the TCEQ conducted study, the study conducted for the City, nor the modeling requested by TCEQ support the City's allegation.

The City further alleges that APAC is in violation of its permit by failing to maintain a buffer zone. The alleged buffer requirement, per their June 3, 2008 letter to Glenn Shankle, is found in special provision 21D of the superseded 1998 permit<sup>5</sup>. This "buffer" requirement is under the permit section bearing the title "Relocation Restrictions" and regards potential sites in the event of a relocation of the facility and in no way applies to current operation. Also, the facility has been in its current location since 1981 and APAC cannot control development of the area. It is apparent, however, that neither the City, the residents, nor the school district opposed locating near the already long established APAC facility when choosing the site for the homes and school. Issues such as this are outside the scope of the permit renewal process.<sup>6</sup>

The City also alleges that APAC does not follow permit requirements regarding the use of recycled fuel oil. This is an incorrect statement. In response, all recycled fuel oil at the facility is analyzed prior to receipt by APAC for compliance with all legal and permit requirements. This facility is inspected very regularly by the Ft. Worth based inspectors who are knowledgeable of the facility, the permit requirements and regulatory requirements and who are thorough in their inspections. The facility maintains a good record for compliance.<sup>7</sup> The City appears to refer to an inspection in 2003 where one fuel analysis was not on site but rather was at the main office. This oversight was corrected and there was not any issue with the fuel oil itself. APAC is unaware of any other issues with the fuel oil or the recordation being in any way in violation of permit conditions or legal requirements in the intervening 6 years and takes this and all permit conditions seriously. The City's final issue is the failure to maintain BACT. As TCEQ is aware, state law<sup>8</sup> restricts actions that may be taken with regard to renewal of air quality permits such that TCEQ may not impose requirements more stringent than those of the existing permit unless

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<sup>3</sup> The chemicals of concern referred to are acetaldehyde, formaldehyde, o-Tolualdehyde, bis(2-Ethylhexyl)phthalate, butylbenzylphthalate, aluminum particulate and total suspended particulate matter greater than 10 microns in aerodynamic diameter.

<sup>4</sup> See the June 7, 2005 letter from the Director of TCEQ Region 4 issued to the Frisco Citizens Air Quality Coalition regarding 2004 sampling events.

<sup>5</sup> The 1999 permit contains special provision 7D which reads: "The plant is located at least 0.25 mile from any recreational area, residence, or facility not occupied by the applicant proposing to install the facilities or occupied by lessor of the facility's property.

<sup>6</sup> The Executive Director's Response to Public Comment at response to comment 3 addresses that TCEQ does not have jurisdiction over zoning and land use issues.

<sup>7</sup> See Executive Director's Response to Public Comment at responses to comments 10, 11 and 15.

<sup>8</sup> Refer to Tex. Health & Safety Code 382.055(c)

the Commission determines that the requirements are necessary to avoid a condition of air pollution or to ensure compliance with otherwise applicable federal or state air quality control requirements. Neither of these exceptions pertain to this matter; however, APAC has voluntarily obtained a permit for the upgrade to BACT. Assuming the permit is renewed, the fabric filter baghouse will be installed per permit timeframes<sup>9</sup>. Accordingly, APAC does not believe there are issues to contest but, to the extent issues raised by the City are not deemed moot, withdrawn or outside the scope of review, they are contested.

With regard to the request letter from Ms. Kresek-Lis, her stated “specific concerns” are that the current environmental controls at the plant are inadequate. She “suggests” the discontinuation of “reclaimed industrial oil” as a fuel source, the installation of a fabric filter to replace the venture scrubber and a solid barrier wall for particulate matter. As a general matter, it does not appear that she has raised an issue for hearing but rather is expressing concerns that she would like TCEQ and/or APAC to consider via her suggestions for modifications. With regard to recycled fuel oil, this is a commonly used product in the industry that results in reduced need for non-renewable resources and the facility does not currently have access to natural gas due to prior road widening by the City. The permit requirements for the recycled fuel oil account for her concern while promoting the TCEQ goal for recycling. Additionally, this would be a significant change in requirements which would not be allowed for a renewal application except to avoid a condition of air pollution or to ensure compliance with applicable air quality control requirements. Ms. Kresek-Lis even acknowledges that her suggestions would impose more stringent requirements but urges her suggestions solely on the basis that they are purportedly “economically reasonable and technically practicable.” Conditions allowing for the imposition of more stringent permit requirements are not present here and her concerns should be alleviated based on the air quality modeling audit by TCEQ air permit division personnel and the information provided in the Executive Director’s Response to Comment at the response to comment number 1. Ms. Kresek-Lis suggests an upgrade to a fabric filter. As discussed, this is already permitted and is awaiting the outcome of this proceeding. With regard to the solid barrier wall, it is highly unlikely that such a barrier would be capable of being installed either from an engineering, space, zoning, or economics standpoint in addition to being a significant change in requirements that is not legally permissible and is acknowledged by the Executive Director as being beyond the scope of an air quality review<sup>10</sup>. However, the stockpiles are required to be sprayed with water or chemical for dust control as necessary for maximum control of dust emissions. Given that Ms. Kresek-Lis has raised concerns as opposed to issues for dispute, it is believed that there are no disputed issues with regard to her request.

C. Whether the dispute involves questions of fact or law.

As addressed above, APAC does not believe there are any actual disputes to be resolved; however, to the extent the Commission believes there are, they would involve questions of law given that there is no relevant or admissible evidence to support the alleged issues and/or they are matters of permit interpretation only.

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<sup>9</sup> See also Executive Director’s Response to Public Comment at response to comment 6.

<sup>10</sup> See Executive Director’s Response to Public Comment at response to comment 7.

D. Whether the issues were raised during the public comment period.

All of the requests were submitted during the public comment period.

E. Whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

Applicant is not aware of any formal withdrawal letters having been filed. However, the City of Frisco's letter did provide for withdrawal in the original request letter.

F. Whether the issues are relevant and material to the decision on the application.

To the extent there are issues to be addressed, APAC does not believe they are relevant and material to the decision. As stated, the commission may not legally impose requirements more stringent than those of the existing permit unless the commission determines that the requirements are necessary to avoid a condition of air pollution or to ensure compliance with otherwise applicable federal or state air quality control requirements. Here, there is no evidence of either condition being met such that more stringent requirements are not permissible. Any issues in this matter are seeking to impose more stringent requirements and/or are outside the scope of review and therefore are not relevant and material.

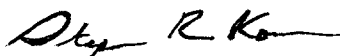
G. Maximum expected duration for the contested case hearing.

The expected duration would depend on the number of parties that would be participating and matters to be addressed. It is expected, however, that the hearing could be completed in 3 days.

### III. Conclusion

APAC-Texas, Inc. appreciates TCEQ and the Commissions efforts in this matter and its consideration of this submittal. The law is clear that the requestors are not entitled to a contested case hearing as a matter of right and such a hearing should not be granted in relation to this permit renewal. APAC concurs with the Executive Director's Response to Public Comment issued in this matter and requests the permit renewal be issued.

Respectfully submitted,  
APAC-Texas, Inc.



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By: Stephen R. Koonce  
Its: President



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